MOTION FILED

MAY 21 1990

No. 89-1659

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1989

WILLIAM H. SCHNEIDER, et al.,

Petitioners,

vs.

APPLE COMPUTER, INC., et al.,

Respondents.

Motion for BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF SECURITIES
AND COMMERCIAL LAW ATTORNEYS
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Herbert E. Milstein
(Treasurer of NASCAT)
Cohen, Milstein, Hausfeld & Toll
1401 New York Avenue, N.W.
Suite 600
Washington, DC 20005
(202) 628-3500
(Counsel of Record)

Robert N. Kaplan
(President of NASCAT)
Mark Gaffney
Kaplan & Kilsheimer
685 Third Street
26th Floor
New York, NY 10017
(212) 687-1980

Jonathan W. Cuneo
(NASCAT General Counsel)
Law Offices of Jonathan W. Cuneo
1300 Eye Street, N.W.
East Tower, Suite 480
Washington, DC 20005
(202) 962-3860

Attorneys for the National Association
of Securities and Commercial Law Attorneys ("NASCAT")

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to Rule 37 of the Supreme Court, the National Association of Securities and Commercial Law Attorneys respectfully moves for leave to file the enclosed brief as amicus curiae in support of the petition for a writ of certiorari in case 89-1659. Respondent Apple Computer, Inc. has refused consent.

Herbert E. Milstein
(Treasurer of NASCAT)
Cohen, Milstein, Hausfeld & Toll
1401 New York Avenue, N.W.
Suite 600
Washington, DC 20005
(202) 628-3500
(Counsel of Record)

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(President of NASCAT)
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Jonathan W. Cuneo
(NASCAT General Counsel)
Law Offices of Jonathan W. Cuneo
1300 Eye Street, N.W.
East Tower, Suite 480
Washington, DC 20005
(202) 962-3860

Attorneys for the National Association
of Securities and Commercial Law Attorneys ("NASCAT")

May 21, 1990

QUESTION PRESENTED

Whether the Ninth Circuit undermined Basic, Inc. v. Levinson, 108 S.Ct. 978 (1988), by holding that, in a "fraud-on-the-market" securities fraud case, misrepresentations by company officials that otherwise violate Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder are "excused" as a matter of law if journalists and commentators opine that the company officials may be wrong?

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INTEREST OF AMICUS CURIAE

The National Association of Securities and Commercial Law Attorneys ("NASCAT")[1] is an association of thirty-six law firms whose purpose is to promote a strong body of federal and state statutory and decisional law to protect investors and other consumers, and to ensure a fair and free marketplace for investments and other products. NASCAT members have represented plaintiffs in a variety of individual and class action contexts under the federal securities laws; some NASCAT members have also represented defendants in securities and other cases.

NASCAT and its members have a strong interest in the effective private enforcement of the federal securities laws and in the development of case law that effectively

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[1] The law firms of Milberg Weiss Bershad Specthrie & Lerach, and Barrack Rodos & Bacine, and Cotchett & Illston, among the counsel for the plaintiff in this case, are members of NASCAT. William S. Lerach is the President-Elect of NASCAT. Neither Milberg Weiss Bershad Specthrie & Lerach, Mr. Lerach, Barrack Rodos & Bacine, nor Cotchett & Illston participated in NASCAT's preparation of this brief.

deters would-be wrongdoers from perpetrating securities fraud upon public investors. NASCAT regards the issues raised by the Ninth Circuit decision in In re Apple Computer Securities Litigation, 886 F.2d 1109 (9th Cir. 1989), as so overwhelmingly important that at a meeting on May 9, 1990, the Executive Committee of NASCAT determined to file this brief of amicus curiae in support of the petition for writ of certiorari in this case.

ARGUMENT

The decision of the Ninth Circuit in Apple will have severe adverse consequences on the application of the federal securities laws. Specifically, the Apple Court "excused" material misrepresentations and omissions made by a corporate issuer of securities on the ground that newspaper articles and written reports of investment

analysts expressed disagreement with defendants' statements. The Apple decision gives license to would-be wrongdoers to defraud public shareholders, creating a new, unprecedented defense in a securities fraud case.

1. The Apple decision undermines this Court's decision in Basic, Inc. v. Levinson, 108 S.Ct. 978 (1988). In Basic, this Court endorsed application of a rebuttable presumption of reliance by investors on publicly disseminated misrepresentations made by issuers of publicly-traded corporate securities, if the misrepresentations were material. This is called a "fraud on the market."

The rationale of the Basic decision was recognition of the manner by which prices of publicly traded securities are set and furtherance of the strong public policy

against securities fraud:

> The modern securities markets, literally involving millions of shares changing hands daily, differ from the face-to-face transactions contemplated by early fraud cases, and our understanding of Rule 10b-5's reliance requirement must encompass these differences. "In face-to-face transactions, the inquiry into an investor's reliance upon information is into the subjective pricing of that information by that investor. With the presence of a market, the market is interposed between seller and buyer and, ideally, transmits information to the investor in the processed form of a market price."...
>
> The presumption of reliance employed in this case is consistent with, and, by facilitating Rule 10b-5 litigation, supports, the congressional policy embodied in the 1934 Act. . . .
>
> The presumption is also supported by common sense and probability. Recent empirical studies have tended to confirm Congress' premise that the market price of shares traded on well-developed markets <u>reflects all publicly available information, and, hence, any material misrepresentations</u>. It has been noted that "it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?" . . . <u>Indeed, nearly every court that has considered the</u>

> proposition has concluded that where materially misleading statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed.

108 S.Ct. at 989-91 (citations omitted; emphasis added).

The Basic decision noted that the presumption of reliance upon material misrepresentations and omissions was rebuttable. Thus, this Court stated in Basic:

> Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance. For example, if petitioners could show that the "market makers" were privy to the truth about the merger discussions here with Combustion, and thus that the market price would not have been affected by their misrepresentations, the causal connection could be broken: the basis for finding that the fraud had been transmitted through market price would be gone. Similarly, if, despite petitioners' allegedly fraudulent

> attempt to manipulate market price, news of the merger discussions credibly entered the market and dissipated the effects of the misstatements, those who traded Basic shares after the corrective statements would have no direct or indirect connection with the fraud.

108 S.Ct. at 992.

2. Purporting to rely on this Court's Basic decision, the Apple court held that if newspaper articles and investment analyst reports disagree with the defendant issuer's misrepresentations and omissions about its own business prospects, defendants are entitled to summary judgment because public investors had two conflicting sources of information on defendants' business prospects, and hence the presumption of reliance on defendants' misrepresentations has been rebutted, as a matter of law. The Apple Court seriously misunderstood the statement from this Court's Basic decision that "recent empirical studies have tended to

confirm Congress' premise that the market price of shares traded on well-developed markets reflects all publicly available information." Basic, 108 S.Ct at 991. The Apple court interpreted this statement to mean that the existence of newspaper articles and investment analyst reports disagreeing with the defendant issuer's misrepresentations, as a matter of law, negates any possibility that the defendant issuer's misrepresentations worked to inflate the market price of defendant's publicly traded securities.

The effect of such information was at most a factual dispute which the Apple court erred in resolving on a motion for summary judgment. In Basic, such factual disputes were also present but this Court decided "Proof of that sort is a matter for trial .... [W]e see no need to engage in the kind

of factual analysis the dissent suggests that manifests the 'oddities' of applying a rebuttable presumption of reliance in this case." Basic, 108 S.Ct. at 992 n. 29.

Thus, the Apple decision undermines this Court's Basic decision and would do away with the presumption of reliance in a fraud on the market case.

3. The Apple court, in affirming summary judgment in favor of defendants, refused to consider significant evidence that undercut the factual premise of the Court's decision. Plaintiffs' financial expert stated that, generally, the market price of a security reflects the statements of issuers of securities about their own business prospects to a greater extent than third party statements in newspaper articles and

investment analyst reports.[2] Plaintiffs also demonstrated the application of this general principle in the context of the case, i.e., that when the defendant issuer disclosed the previously omitted facts, the price of defendant's stock dropped dramatically, losing 25% of its market value in one day.[3]

4. Other decisions in the federal courts are inconsistent with the Apple decision. For example, in In re Western Union Securities Litigation, 120 F.R.D. 629 (D.N.J. 1988), the Court rejected the argument that public investors' reliance on the defendant issuers' misrepresentations

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[2] The Apple court thus refused to apply its prior holding in Hughes v. Dempsey-Tegeler Co., 534 F.2d 156, 176 (9th Cir.), cert. denied, 429 U.S. 896 (1976), that "a misrepresentation may cause the person to whom it is addressed to discount the other information available to him."

[3] The Apple court thus rejected the principle upheld in Jaroslawicz v. Engelhard Corp., 704 F.Supp. 1296 (D.N.J. 1989), that a price decline upon disclosure of previously omitted facts is evidence of the materiality of the omitted facts.

about its own business prospects in a fraud on the market case could be rebutted by reports in the national news media conflicting with those misrepresentations. In that case, the Court held: "acceptance of defendants' argument would send a message to corporations and others that they need not be bound by the disclosure requirements of the federal securities laws as long as they disseminate some accurate information to the market, or perhaps even if such information otherwise exists. Such a position would controvert the purposes behind Rule 10b-5 ..." 120 F.R.D. at 638. The Western Union decision would deter securities fraud; the Apple decision would "excuse" it in equivalent circumstances.

Because of the conflict in the lower courts with respect to the rebuttable presumption of reliance in a fraud on the

market case endorsed in this Court's Basic decision, the undersigned amicus curiae respectfully supports the petition for a writ of certiorari in this action.

Dated: Washington, DC
May 21, 1990

Respectfully submitted,

Herbert E. Milstein
(Treasurer of NASCAT)
Cohen, Milstein,
Hausfeld & Toll
1401 New York Ave., NW
Washington, DC 20005
(202) 628-3500

Robert N. Kaplan
(President of NASCAT)
Mark Gaffney
Kaplan & Kilsheimer
685 Third Avenue
26th Floor
New York, NY 10017
(212) 687-1980

Jonathan W. Cuneo
(NASCAT General Counsel)
Law Offices of
Jonathan W. Cuneo
1300 Eye Street, N.W.
East Tower, Suite 480
Washington, DC 20005
(202) 962-3860

Attorneys for the National Association of Securities and Commercial Law Attorneys ("NASCAT")

PROOF OF SERVICE BY MAIL

District of Columbia) ss:

I am a citizen of the United States and a resident of or employed in Washington, DC; I am over the age of 18 years and not a party to the within action; my business address is 1300 Eye Street, N.W., East Tower, Suite 480, Washington, DC 20005.

On May 21, 1990 I served the within Brief of Amicus Curiae... in "William H. Schneider v. Apple Computer" in the United States Supreme Court, No.89-1695 on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with first-class postage thereon fully prepaid, in the United States Post Office Mail box at Washington, DC, addressed as follows:

M. Laurence Popofsky
Douglas M. Schwab
Heller, Ehrman, White & McAuliffe
333 Bush Street
San Francisco, California 94104
(415) 772-6000

Counsel for Respondents
Apple Computer, Inc., Gene P. Carter, John D. Couch, Wilifrid J. Houde, Steven P. Jobbs,
A.C. Markkula, Jr., Michael Muller, John Vennard,
John Sculley, Delbert W. Yocam, and Kenneth R. Zerbe

Counsel for Petitioner
William S. Lerach
Leonard B. Simon
(Counsel of Record)

Eric A. Isaacson
Milberg Weiss Bershad Specthrie & Lerach
225 Broadway, Suite 2000
San Diego, CA 92101
(619) 231-1058

Edward M. Gergosian
Barrack Rodos & Bacine
1845 Walnut Street, Suite 2100
Philadelphia, PA 19103
(215) 963-0600

Joseph W. Cotchett
Susan Illston
Cotchett & Illston
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
(415) 697-6000

Sherrie R. Savett
Stephen D. Ramos
Jeanne A. Markey
Berger & Montague
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Stuart H. Savett
David H. Weinstein
Barbara A. Podell
Kohn, Savett, Klein & Graf, P.C.
1101 Market Street, Suite 2400
Philadelphia, PA 19107
(215) 238-1700

All parties required to be served have been served. I declare under penalty of perjury, that the foregoing is true and correct.

All parties required to be served have been served. I declare under penalty of perjury, that the foregoing is true and correct.

Executed on May 21, 1990 at Washington, DC.

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Jonathan W. Cuneo